Supreme Court, U. S.
FILED
SEP 24 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Case No.: 78-506

CHARLES FREDERICK BOWER,
Petitioner,

—vs—

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	PAGE
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4-7
REASONS FOR GRANTING THE WRIT	
1. When there is no evidence of any predisposition to commit a crime and the defendant established that a paid government informant, after many efforts covering several months, created a circumstance resulting in a single cocaine prosecution, the defendant was entitled to an acquittal by reason of entrapment especially when the defense was prohibited from fully developing his defense relating to the informant both pretrial and during trial by the rulings of the trial court.	7
2. That the submission of the firearms charge to the jury, when the carrying of a concealed firearm in one's own dwelling house constitutes no offense to State law, but the defendant was charged with violating federal gun laws, so prejudiced the defendant so as to deny him a fair trial.	17
CONCLUSION	23

APPENDIX

1. The decision of the Court of Appeals
Fifth Circuit
A.1–A.12

2. Petition for Rehearing
1 - 4

TABLE OF AUTHORITIES

Cases: **PAGE**

Alford v. United States, 9
282 U.S. 687 (1931)

Bruno v. United States, 22
(1939) 308 U.S. 294, 60
S. Ct. 200

Chambers v. Mississippi, 16
410 U.S. 284 (1973)

Clingan v. United States, 16
400 Fed.2d 869 (5th Cir. 1968)

Davis v. Alaska, 13
415 U.S. 308 (1974)

Fla. Stat. 790.07(2) 19

Fla. Stat. 790.25(3)(n) 19

French v. State, 19
279 So.2d 317 (4 Fla. DCA 1973)

PAGE

Gerstein v. Pugh, 21
420 U.S. 103 (1975)

Gregory v. United States, 16
369 Fed.2d 185 (CADC 1966)

Hampton v. United States, 7
425 U.S. 484, 96 S.Ct. 1646, 48
L.E.D. 2d 113 (1975)

Kotteakos v. United States, 22
382 U.S. 750 (1946)

Lopez-Hernandez v. United States, 9
394 Fed. 2d 820 (9th Cir. 1968)

Michelson v. United States, 21
335 U.S. 469 (1948)

Peoples v. State, 19
287 So.2d 63 (Fla. 1973)

Perkins v. United States, 18
526 Fed.2d 688 (5th Cir. 1976)

Pierce v. United States, 12
414 Fed.2d 163, 165 (5th Cir.),
cert. denied 396 U.S. 960 (1969)

Roviaro v. United States, 14
353 U.S. 53, (1957)

Schaffer v. United States, 21
362 U.S. 511 (1960)

PAGE

Scher v. United States, 14
305 U.S. 251 (1938)

Sherman v. United States, 12
356 U.S. 359 (1958)

Smith v. Illinois, 13
390 U.S. 129 (1968)

State v. Winters, 19
346 So.2d 991 (Fla. 1977)

United States v. Bower, 2
5757 Fed. 499 (5th Cir. 1978)

United States v. Bueno, 12
447 Fed. 2d 903 (5th Cir. 1971)

United States v. Gaskin, 19
320 U.S. 527 (1944)

United States v. Groessell, 12
440 Fed.2d 602 (5th Cir. 1971)

United States v. Groessell, 12
440 Fed. 2d 602, 606 (5th Cir.) cert.
denied 403 U.S. 933 (1971)

United States v. Howard, 18
504 Fed.2d 1281 (8th Cir. 1974)

United States v. Puma, 12
548 Fed.2d 903 (5th Cir. 1977)

PAGE

United States v. Ramirez, 18
482 Fed.2d 807 (2nd Cir. 1976) cert.
denied 414 U.S. 1070 (1973)

United States v. Rivero, 18
532 Fed. 2d 450 (5th Cir. 1976)

United States v. Russell, 8
411 U.S. 423, (1973)

United States v. Soria, 18
519 Fed.2d 1060 (5th Cir. 1975)

Williamson v. United States, 9
311 Fed. 2d 441 (5th Cir. 1962)

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Charles Frederick Bower, seeks to have this Court issue its Writ of Certiorari to the United States Court of Appeals, Fifth Circuit, to review the decision of that Court affirming the conviction of Petitioner which occurred before the United States District Court for the Southern District of Florida.

OPINION BELOW

The decision of the Court of Appeals is reported in *United States v. Bower,* 575 F.2d 499 (5th Cir. 1978) and is contained in the Appendix to this Petition at A1-12. A timely Petition for Rehearing was denied on 23 August 1978, a copy appears in the Appendix at A13. A Stay of Mandate has been filed by Petitioner on or about 31 July 1978. To date, no action has been taken on said Motion for Stay of Mandate by the Appeals Court. As this Petition for Writ of Certiorari is jurisdictional, Petitioner files same without any action on the Stay of Mandate.

JURISDICTION

The judgment of the United States Court of Appeals was entered on 19 June 1978. The jurisdiction of this Court to review the decision of the Court of Appeals is involved pursuant to Title 28 USC § 1254 (1).

QUESTIONS PRESENTED

1. WHETHER THE PETITIONER WAS ENTITLED TO EITHER AN ACQUITTAL BY REASON OF ENTRAPMENT OR WAS DENIED A FAIR TRIAL SO AS TO MANDATE REVERSAL WHERE THERE WAS NO EVIDENCE OF ANY PREDISPOSITION TO COMMIT THE OFFENSE AND THE PETITIONER ESTABLISHED, BUT WAS FRUSTRATED IN THE PREPARATION AND CONDUCT OF HIS DEFENSE THROUGH THE RULINGS OF THE TRIAL COURT WHICH PREVENTED HIS DEVELOPING THE TRUE AND FULL CIRCUMSTANCES RELATING TO THE FACT THAT A PAID GOVERNMENT INFORMANT, AFTER MANY EFFORTS COVERING SEVERAL MONTHS OF PERSUASION, CREATED A CIRCUMSTANCE RESULTANT IN A SINGLE COCAINE TRANSACTION FOR WHICH PETITIONER WAS PROSECUTED.

2. WHERE THE CARRYING OF A CONCEALED FIREARM BY A HOMEOWNER IN HIS OWN DWELLING HOUSE CONSTITUTES NO OFFENSE, IS THAT POSSESSION OF A FIREARM MADE UNLAWFUL MERELY BECAUSE THE HOMEOWNER MAY POSSESS COCAINE WITH THE INTENT TO DELIVER THE SAME, ESPECIALLY WHEN THE FIREARM PLAYS NO PART IN THE AFOREMENTIONED OFFENSE, AND WHETHER THE TRIAL COURTS SUBMISSION OF THIS COUNT TO THE JURY, AFTER THE MAGISTRATE DISMISSED SAID CHARGE, SO PREJUDICED THE PETITIONER SO AS TO REQUIRE RETRIAL.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT FIVE

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT SIX

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defense.

STATEMENT OF THE CASE

A. HISTORY

On 30 August 1976, the Defendant was arrested and on the following day appeared before the magistrate where the Complaint was presented. Bond was set and the Defendant released. The preliminary hearing occurred on 16 September 1976.

On 5 October 1976, an Indictment was returned in two Counts, the first charged a possession with intent to distribute cocaine and the second charged the Defendant did distribute cocaine. On 15 October 1976, arraignment occurred and thereafter the government filed a superseding indictment charging Petitioner with a firearms violation.

After Petitioner filed pretrial Motions, an evidentiary hearing was set for 24 February 1977, on the Motion to Suppress and to Dismiss. The District Judge referred the motions pursuant to Title 28 USC § 636(b) to the magistrate for hearing and recommendation.

The magistrate made report to the court upon the motion to suppress and upon the motion to dismiss after hearing. In the former the magistrate noted the government announced it would "not seek to introduce" anything taken from the Defendant's residence except that received from the Defendant (cocaine) by the agent or taken from the person of the Defendant at the time of arrest. In the latter, the motion to dismiss, the magistrate ruled that the motion as addressed to the third count be granted. That third count was the only thing added by the superseding indictment, the remainder of the indictment was the same.

The prosecution noted an intention to appeal that ruling to the District Judge; and it did so on 15 March 1977.

On 18 November 1976, the Defendant filed a further motion for disclosure of Informant. An order was entered noting the Government filed a response identifying the informant as RICHARD CLEGG and representing he would be called as a witness at trial and provided his location would be refused the Defendant but he was required to be made

available to interview by the Defendant prior to commencement of trial. Such was not done and the witness was precluded from use by the Government.

Trial commenced on 4 April 1977 and resulted on 6 April 1977, in a verdict of guilty on each of the three counts. However, prior to verdict, at the close of the government's case and close of the entire case, the Defendant made motion for judgment of acquittal; the court denied it as to the first two counts and reserved ruling as to the third count. The Defendant filed a renewed motion for judgment of acquittal and alternate motion for new trial on 13 April 1977. On 21 April 1977, the court entered an order (1) denying Motion for new trial, (2) denying Motion for judgment of acquittal as to count one and two, and (3) granting the motion for a judgment of acquittal on the third count.

The Defendant was sentenced on 26 May 1977 for a period of imprisonment for two (2) years followed by a special parole of three (3) years upon count one with a like sentence upon count two to run concurrently with the sentence in count one. An appeal and affirmance of the conviction followed.

B. FACTS

The Defendant was living in a quadruplex in which one of the units was occupied by his girlfriend Robyn Retzer. Subsequently, another girl, one Deborah Russell moved in with the girlfriend and became her roommate. Later yet, the ex-fiance, boyfriend of the roommate moved into the same apartment with the two girls; his name was Richard Clegg. The latter, unknown to the Defendant was a paid, government informant and so ultimately functioned in this case.

Shortly after the informant Richard Clegg arrived on the scene, he began to freely use drugs of various kinds and began a program of attempting to cause the Defendant to acquire drugs for him; the Defendant declined to have anything to do with it as he had with others.

Finally, after about thirty efforts, the informant found the Defendant in such depressing circumstances that he was

able to prevail upon him and enlist his aid in acquiring a quantity of cocaine. The Defendant and his girlfriend had parted and the Defendant was depressed. In reviewing his circumstances, Petitioner found he was going nowhere and determined he ought return to college to finish the last year required to obtain his degree. The informant urged that the Defendant could make exhorbitant gain in one cocaine transaction and provide the funds necessary to his schooling. Thereafter, with trepidation, the Defendant agreed to try to find a quantity of cocaine for the informant. Initially, the Defendant was only to acquire it for the informant and he was neither to meet nor deal with any other person. However, as the transaction began to mature, the circumstances changed. The Defendant expressed he wanted to stop and not continue with the matter.

The informant advised the Defendant the he needed to deal with the "buyer". The Defendant advised he did not want to participate further but the informant countered with assertions that the "buyer" was a violent person, a "heavy" and they were both in great danger for their personal safety if it did not conclude as planned. The "buyer" was a federal agent.

In terror, the Defendant went through with the transaction after arming himself for protection. As the "buyer" talked of more the Defendant went along with the conversation as means of protecting himself.

The "buyer" appeared and that buyer was Dennis Silvestri an agent for the DEA [the United States Drug Enforcement Administration].

Shortly after his appearance that agent pointed a firearm at the Defendant and announced he was under arrest. That agent had no knowledge of what representations or statements were made to the Defendant by the informant, Richard Clegg, a paid informant in order to bring on the transaction. The full amount of payments, including payments as an informant in other cases as well as the full disclosure of how long the informant had functioned was at first ordered but the court shortly thereafter receded from the ruling and it was not disclosed, but made a part of the court's file. The Informant received one hundred ($100.00) dollars for expenses before the arrest and one thousand ($1,000.00) dollars as "reward" for making

the case.

Except for a "background" check agent Silvestri got all of his information from the informant. The informant was never monitored and just what or how his representations to the Defendant occurred was not known by the agents except as to what the informant might have related. The informant was given no words of limitation or instructions as to what he might represent to the Defendant.

The firearm taken from the Defendant was used in no way by him and the arresting agent was wholly unaware it was possessed by the Defendant until removed from him; it played no part in the entire episode. It was never tested and it is wholly unknown whether it will even operate as a firearm.

REASONS FOR GRANTING THE WRIT

1. When there is no evidence of any predispostion to commit a crime and the defendant established that a paid government informant, after many efforts covering several months, created a circumstance resulting in a single cocaine prosecution, the defendant was entitled to an acquittal by reason of entrapment especially when the defense was prohibited from fully developing his defense relating to the informant both pretrial and during trial by the ruling of the trial court.

It is well established, that the key element to be determined when an entrapment defense is raised is whether or not the Defendant was predisposed to commit the crime. *Hampton v. United States*, 425 U.S. 484, 96 S.Ct. 1646, 48 L.E.D. 2d 113 (1975). As this Court has stated:

> "The function of law enforcement is the prevention of crime and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime. Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer. However, 'a different question is presented when the criminal design originates with the officials

of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute' ".

United States V. Russell, 411 U.S. 423, (1973).

In the instant case, there is no question but that the Petitioner's defense was wholly predicated upon entrapment. The Defendant testified thusly, as did the witness, Robyn Retzer, called by the Defendant. An agent for the DEA, Dennis Silvestri testified that he made the arrest of the Defendant. He testified that his first attention to the Defendant came as a result of information given to him in April of 1976 by a paid government informant, Richard Clegg. Although the "arrest" did not occur until August of 1976.

It is uncontroverted, that the transaction for which the Defendant was prosecuted is that which had transpired between Clegg (the paid informant) and the Defendant. However, there was no recording or other transcript to reflect the words which produced the alleged criminal episode. The informant was never instructed as to what he could or could not represent in arriving at a transaction with the Defendant. The DEA agent never heard of the Defendant until he was told of the existence of him by the informant and, except for "background" information (such as driver's license, etc.) which the agent obtained from various agencies, all of that learned by him came from representations of the informant alone.

The first conversation the agent ever had with the Defendant occurred only minutes before he arrested the Defendant for the episode for which he was tried in this case.

Without the benefit of the testimony of the informant, the only testimony as to what, when, where and in what words the alleged criminal transaction came into being is found in the testimony of the Defendant. There were conflicts between the testimony of the agent (Silvestri) and the Defendant as to what actually occurred. Those events occurred at a time not only when the paid informant was present but also the entire episode

was arranged in detail to the very moment of the arrest transaction by that same paid informant. Thus, under these circumstances, to deny the identity so the informant could be employed by the Defendant as a witness was reversible error. *Lopez-Hernandez v. United States,* 394 Fed.2d 820 (9th Cir. 1968).

There is no doubt that the informant was paid. He was paid $100.00 in "expenses", and a "reward" of $1,000.00 for making the case possible (and prior to trial). This case is on point with the case of *Williamson v. United States,* 311 Fed.2d 411, (5th Cir. 1962) wherein an informant was paid in a contingent manner much as in this case. There, as here, no testimony evidencing any limitations upon the representations the informant might make in his activities with the Defendant, to insure that the criminal plan did not originate with the informant but rather, the informant only furnished the defendant the opportunity to do that which he otherwise planned to do anyway. Instantly, the Defendant attempted in every manner possible to investigate the informant. In response to the Defendant's Motion to Compel the disclosure of the name and address of the government's informant, the government disclosed the informant to be Richard Clegg. However, when the Defendant attempted to get the address of the informant witness (the government had asserted it was going to have the informant testify), the court refused to order the government to furnish the address of said informant to the Defendant. It is thusly, the Petitioner's position that his Fifth Amendment right to a fair trial and Sixth Amendment right to compulsory process, were denied through the court's action and that he was wholly prevented from making any independent investigation of the informant. [Compare: *Alford v. United States,* 282 U.S. 687 (1931); *Smith v. Illinois,* 390 U.S. 129 (1968).

It must be remembered that the government *represented* it would call the paid informant as a witness, and the court ordered and required that he be made available *prior* to trial for the Defendant to question. While the opinon of the lower appellate court states that Petitioner was granted "the *right* to interview Clegg at any time before trial", *United States v.*

Bower, 575 Fed.2d 499, 503 (5th Cir. 1978), such is contrary to the facts. The government was only to produce the informant, Clegg, just prior to trial. Thereupon, the Defendant was limited to such interview with no address for the informant or the ability to learn anything of him in his community or to garner impeaching material. The government, however, never complied; thus Clegg was not permitted to testify. However, the fact that the trial court precluded the witness from testifying is not a full answer to the issues presented. As Petitioner was traveling upon a defense of entrapment and could perhaps have been better supported in his defense with the testimony of Clegg; regardless of his identity being known, the Defendant was wholly *prevented* from exploring and thereupon developing this testimony. He could learn nothing of the paid informant; a result of the denied use of the witness by the government, such that the defense never had an opportunity to interview or investigate the informant.

Under the circumstances, the Defendant was left without anything by way of "background" to reflect upon the informant, his propensisties or abilities in functioning as such. However, there is much testimony by the DEA agent, Silvestri, as to his actions with the informant or as a result of representations made by the informant. It is clear, therefore, that the deprival was not limited to the pretrial period. During the course of the trial, the Defendant attempted to develop from the DEA agent, Silvestri, testimony as to the total amount the informant was paid by the DEA for his function as an informant, the Court at first ordered it be disclosed, but then receded from that position to limit it to the payments made only in this case. The government initially introduced testimony relating to the informant from the DEA agent, Silvestri; the Defendant only attempted to explore fully the matter of the informant. That he was paid large sums of money over a period of time is certainly a factor to which the jury, in its deliberations might turn, to understand and appreciate the ability of the informant and his skill as such developed by his many experiences. Being skillful surely would allow the jury to believe he could have *created* the crime rather than merely to have offered a predisposed person an opportunity to commit the crime he otherwise intended to

commit.

The transcript of trial demonstrates clearly that it was solely the paid informant who brought the Defendant to the attention of the DEA. The initial such directing of attention occurred in April, 1976. It was not until 30 August 1976 that the episode for which the Defendant was tried was alleged to have taken place. Therefore, though no act, deed, or thing unlawful or connected with this case took place until months after the April date, the paid informant brought the Defendant to the attention of the DEA agent. The testimony further indicates that from April through the end of August, the paid informant on some thirty different occasions, attempted to lure the Defendant into a narcotics transaction, but to no avail. Finally, after long effort, at a time when the Defendant was under unusual depressing circumstances, and representing an opportunity to make an exhorbitant gain allowing him to return to school, the Defendant succumbed. *U.S. v. Bower*, supra, at 503-504. Moreover, the informant represented it would be safe and the Petitioner would only deal with the informant, with whom he was already acquainted and friendly.

As the circumstances changed, the Petitioner, according to the only evidence adduced at trial, attempted to withdraw and not go through with the transaction. However, the paid informant (later "rewarded" with $1,000.00 by the DEA for making this case), implored the Defendant to go on or he, the informant, would be killed and implied the same fate to the Defendant.

The rulings of the trial court, which were affirmed by the lower appellate court, stripped the Petitioner of any opportunity to develop or present the circumstances surrounding the informant. The government presented only the DEA agent (who posed as the buyer) to relate the transaction itself, without any evidence touching upon the circumstances relating to the transaction. The full case-situation was not disclosed. The jury was put much in the position of one determining the breed of a dog by viewing only the tail.

The trial court recognized that the Defendant raised the defense of entrapment and so instructed the jury. It is clear,

that once the matter of entrapment became an issue, it was the burden of the government to prove, beyond every reasonable doubt that the Defendant was not the victim of entrapment. See: *United States v. Groessell*, 440 Fed.2d 602 (5th Cir. 1971). Not only did the government fail to so establish, but also both the court and government prevented the Defendant from adducing all of those circumstances surrounding the paid informant to corroborate the testimony and evidence of entrapment as introduced by the Defendant.

It is the Petitioner's position that the record in the instant case presents a classic instance where entrapment exists as a matter of law. *Sherman v. United States*, 356 U.S. 359 (1958). The record presented in the instant case contains uncontradicted evidence of the paid informant's repeated attempts to persuade the Petitioner to procure narcotics for him. One might contend that the Petitioner was "an innocent seduced by a government agent." *Pierce v. United States*, 414 Fed.2d 163, 165 (5th Cir.), cert. denied 396 U.S. 960 (1969).

The government was satisfied to rest its case during trial against the entrapment defense without ever calling the informant or otherwise refuting any of the testimony offered by the Defendant and his witnesses, each who stood unimpeached. The idea of the cocaine transaction arose with the informant, not in the mind of the Defendant. It was the response of the Defendant, some thirty times that he was not interested in any such transaction. *United States v. Bower*, supra at 504. There is an absolute dearth of evidence to reflect the Defendant ever did or would have dealt with cocaine in any way except for the actions and representations of the informant who was, at those very moments functioning as an adjunct to the DEA agent. *United States v. Groessell*, 440 Fed.2d 602, 606 (5th Ci.) cert. denied 403 U.S. 933 (1971). See: *United States v. Puma*, 548 Fed.2d 508 (5th Cir. 1977).

Where from the testimony of the Defendant alone entrapment is demonstrated as a matter of law, the absence of evidence by the government to contradict the Defendant, mandates reversal. *United States v. Bueno*, 447 Fed.2d 903 (5th Cir. 1971). See also: *United States v. Groessell*, supra.

The facts of this case admit of the reasonable existence of entrapment, it was not dispelled by the government, as a matter of law the Defendant was entitled to discharge upon that defense. *Sherman v. United States*, supra.

The Petitioner further asserts that his right to a fair trial was prejudiced in that the jury was not apprised of all the relevant evidence. Though the Defendant relied upon a defense of entrapment by a paid government informant and the ability of the informant to lure the Defendant into criminal activity was an issue, the trial court refused to permit the Defendant (as previously discussed) to inquire into the total amounts paid by the DEA to the informant for his services as such and limited the inquiry to solely the amount paid in this case. The appellate court by its affirmance of the conviction approved the trial court's ruling and dispatched the same by asserting the same was not relevant evidence. Undoubtedly, the court overlooked the fact that the length of service, the experience, the number of instances when the informant was "able" to cause the arrest of others (and the amount he was paid therefore) would shed light on whether the Defendant was "lured" into the criminal act. The circumstances are clearly akin to the ability of a salesman, it is not measured by a *single* sale but rather on his *many* sales. The jury may have had the balance tipped in the favor of the Defendant's assertion of entrapment if they had known of the long series of occasions when others were led to commit an offense by the informant. Compare: *Davis v. Alaska*, 415 U.S 308 (1974).

Although the government was precluded from calling Clegg as a witness, due to the prosecution's failure to produce the witness did not render the error of the trial court's holding that the Defendant was not entitled to the address of the informant, moot. The decision of the appellate court which summarily held that Petitioner was not entitled to the address of the identified informant is wholly contrary to prior holdings of this Court wherein the value of the address of a witness has been demonstrated. See: *Alford v. United States*, supra; *Smith v. Illinois*, supra. Had the informant testified there is no doubt that his true name and accurate address could be had by the Defendant. *Id.*

The informant was not a *formal witness* in this case to the extent that he *appeared* and testified. However, his actions were the subject of much testimony as was the result of his representations. That he functioned otherwise than in this case as a paid informant is not in doubt to any, *except the jury* who was privy to no testimony reflecting that matter.

There is no question but that the DEA agent acted through Richard Clegg (the informant), he did not furnish a mere lead but actually, grossly participated in the episode for which the Defendant was prosecuted to the moment of arrest. He played such a part a disclosure of his identity was manifestly necessary. *Roviaro v. United States*, 353 U.S. 53, (1957). *Scher v. United States*, 305 U.S. 251 (1938). Although the government realized this and identified the informant, it nevertheless obtained a protective order. This protective order completely frustrated the defense, for it was unable to make any independent investigation of the paid informant as well as precluding Petitioner the right to interview him to become apprised of precisely what the informant would admit to and testify to in a manner the Defendant could utilize in trial. It is not a sufficient answer, since the prosecution failed to produce the paid informant for interview prior to trial they would be precluded from employing his testimony as the trial court ruled and appellate court affirmed. *United States v. Bower*, supra at 502-503.

The Petitioner, pursuant to the Sixth Amendment of the Constitution of the United States is not only guaranteed the right ". . .to be confronted with the witnesses against him;" but is also guaranteed ". . .to have compulsory process for obtaining witnesses in his favor,. . .". In the instant case, Petitioner was actually deprived of the opportunity to determine the full extent this witness might be in his favor and also deprived of that knowledge necessary to be able to serve process upon that witness compelling him to attend. At no time from arrest to trial did Petitioner have any real opportunity to confront this party who amounted to if not an actual, at least a constructive, witness against him. Although the opinion of the appellate court asserts that the Petitioner was granted the right to interview the informant before trial, such is not actually the

case. The government was only to produce the informant Clegg, just prior to trial. Thereupon, the Defendant was limited to such interview with no address of the informant or the ability to learn anything of him in his community or garner impeaching materials. Due process of law as prescribed by the Fifth Amendment surely cannot be so construed as to render the words of the Sixth Amendment empty but fine sounding phrases. The Defendant sought the address and other particulars of identity of the paid informant in order to subpoena him for trial and so made it known to the court along with the matter of the non-disclosure aligning itself within the perimeters of "Brady" material. The court acknowledged the stated purpose of the Defendant but refused to grant the Defendant's motion allowing the government to continue its concealment of the paid informant witness. The disclosure was never made to the Defendant. Thusly, the Defendant was placed in the position of having the actions of the paid informant together with the fact of representations made to him by the DEA agent, and acted upon by the latter, used against him but without any opportunity to cross-examine the paid informant. And, further, the Defendant was not in a position to either investigate, interview or call the paid informant as a witness. The opinion of the court of appeals in the instant case, alleges that Petitioner could have sought to subpoena Clegg for trial through the Office of the United States Attorney. *United States v. Bower*, supra at 503. Clearly, as such was not the actual address of the informant, coupled with the fact that Petitioner had been told by the court that he would be given an opportunity to "interview" said informant immediately prior to trial, is inconsistent with the lower court's holding. Moreover, Petitioner was not in a position to either investigate, interview or call the paid informant as a witness. It need be remembered relative to the disclosure of informants, that "once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable." *Roviaro v. United States*, supra. No justification stands apparent for the secreting from Defendant of this witness to actual facts of the case. Nonetheless, such occurred. Both sides, the prosecution

and defense, have equal rights and should have equal opportunities to interview witnesses. *Gregory v. United States*, 369 Fed.2d 185 (CADC 1966).

To have denied the Petitioner the opportunity to call the informant as an adverse witness was reversible error. *Clingan v. United States*, 400 Fed.2d 869 (5th Cir.1968). Petitioner in the instant case sought the address in order not only to investigate and interview but also to subpoena as a witness. He was refused every opportunity with regard to the witness, except being nakedly furnished his name by the government.

It must be noted, that the *only* reason urged by the government and acted upon by the court to deny the address of the paid informant to the Defendant was the assertion that ". . .the Defendant was in possession of an automatic handgun at the time of his arrest and the informant thus has 'concern for his personal safety'." No assertion was ever made that the *possession* was unlawful much less that the Defendant ever tried to use it or had any history of violence or even remarked upon such propensity. The prosecutor had to know the agent's testimony was such that except for being on the person of the Defendant, the gun played no part in the alleged criminal episode. The paid informant never in person or by affidavit attested to such "concern". Surely that "concern" could not serve to wholly deprive the Defendant and his counsel from learning the identity and location of material witnesses, interviewing them or calling them as witnesses and still comport with the Fifth and Sixth Amendments of the Constitution. The right to confront and cross-examine witnesses and to call witnesses in one's own behalf is essential to due process. *Chambers v. Mississippi*, 410 U.S. 284 (1973).

There were clear infringements, without just and lawful cause or right, of the constitutional rights of the Petitioner, which necessitate reversal. Petitioner demonstrated that he was entitled to a judgment of acquittal as a matter of law on his defense of entrapment and further, that he was severely prejudiced by the limiting of his cross-examination as to relevant evidence such that his constitutional rights were violated.

2. That the submission of the firearm charge to the jury, when the carrying of a concealed firearm in one's own dwelling house constitutes no offense to State law, but the Defendant was charged with violating federal gun laws, so prejudiced the Defendant so as to deny him a fair trial.

The Petitioner was originally charged in a two-count indictment with possession with intent to distribute and distribution of cocaine. *United States v. Bower*, supra at 501. Subsequently, a superseding indictment was filed, charging Petitioner with possession of a firearm during the commission of a felony in violation of 18 USCA § 924 (c)(2), alleging the Petitioner, at the time of committing set forth in the first two counts was unlawfully carrying a firearm.

Thereafter, the Petitioner moved to dismiss the superceding indictment, said motion being referred to the United States Magistrate, "who recommended the motion be granted". The district court, however, denied the motion, and trial commenced on all three counts. At the close of the government's case and at the close of the entire case, Defendant moved for judgment of acquittal. The district court denied the motion as to the first two counts and reserved judgment as to count three. After the jury had returned the verdict of guilty on all three counts, the district judge sentenced the Defendant. . .and granted Defendant's renewed motion for judgment of acquittal as to count three, the federal firearms count. *United States v. Bower*, 575 Fed.2d 499, 501 (5th Cir. 1978).

The facts surrounding the offense charged in the third count are nowhere in dispute. The Defendant, at the time of the other alleged offenses and at the time of his arrest for the same was in his dwelling home, he so asserts and the government agreed and asserts. Therefore, if any offense occurred, it was unquestionably within the confines of his home, his dwelling house.

There was no attempt to assert that the Defendant *used* the firearm in any way (and factly, the government knew he did not use or attempt to use it in any way) the government's position is founded on mere *possession* as is the statute involved (Title 18 USC § 924 (a) (c) (2).

Petitioner maintains mere possession is not a violation of this statute. The government must prove, in addition to the elements necessary to establish the commission of the offense, during which the weapon was allegedly carried, that the firearm was *unlawfully* carried or possessed. *Perkins v. United States*, 526 Fed.2d 688 (5th Cir. 1976). In the absence of establishing that the possession of the weapon was unlawful in itself, the proof will not sustain the conviction. *United States v. Soria*, 519 Fed.2d 1060 (5th Cir. 1975); *United States v. Ramirez*, 482 Fed. 2d 807 (2nd Cir.) cert. denied 414 U.S. 1070 (1973). The employment of the word "unlawfully" means carrying a gun contrary to any law, be it federal, state or municipal. *United States v. Howard*, 504 Fed.2d 1281 (8th Cir. 1974); see also: *United States v. Rivero*, 532 Fed. 2d 450 (5th Cir. 1976). The opinion of the court below recognizes that a policeman lawfully possessing a firearm but who commits a felony is exempt from the operation of the statute. However, the court did not equate the right of the homeowner to possess a firearm, concealed on his person, while in his dwelling house to his possessing a license to do so, since the homeowner under those circumstances is exempt from the required license. Each being appropriately licensed to carry a firearm (one by grant and the other by exemption) is *lawfully carrying* the firearm. Each would be equally responsible for any felony committed while so carrying the firearm but neither would be guilty of "unlawfully" carrying the firearm, as logic would dictate. The court below, obviously created a conflict and special class of person in the instant case.

The magistrate, in recommending the dismissal of count three of the indictment reported: "On 30 August 1976, the Defendant Charles Frederick Bower, was arrested in his home by special agents of the Drug Enforcement Administration for the knowing possession with intent to distribute and distribution of a quantity of cocaine hydrochloride to those agents. A search of Bower's person, immediately after his arrest, revealed that he was carrying a loaded 22 caliber automatic pistol concealed in his waistband. It was conceived by the government that the defendant never brandished or otherwise displayed the pistol at any time."

The magistrate then determined by the legislative history of the act that a violation occurs only if possession of a firearm is itself unlawful. He recognized the Florida Statutes relating to the carrying of a firearm in one's own dwelling home rendered that carrying not unlawful (Fla.Stat. 790.25 (3) (n) and it had been so construed by the courts of Florida. *Peoples v. State*, 287 So.2d 63 (Fla. 1973); *French V. State*, 279 So. 2d 317 (4 Fla. DCA 1973). The district court judge, thereafter, entered an order denying the motion to dismiss asserting that the Petitioner could not "use it and carry it in the performance of another felony" without violating the statute. Apparently that ruling completely ignored the findings made by the magistrate which were later confirmed at trial, that the weapon was not brandished or used by the Defendant.

In deciding the instant case, the lower court recognized that the highest court of the State of Florida has construed the Florida statutes relating to the carrying of firearms on the person in such a manner that it is not unlawful for one within his home to carry a firearm concealed on his person. *Peoples v. State*, supra. However, the court then opined that pursuant to the Statute § 790.07 (2), it would be unlawful if the homeowner within his home was committing the felony of delivery of cocaine and the firearm played no part in the commission of that felony but was simply on the person of the homeowner. In short, although the Defendant-homeowner lawfully concealed a firearm on his person, the mere fact that subsequently within his home he delivered cocaine to another while the firearm was on his person, and in no way being used by him, created an offense of unlawfully carrying a firearm. No decision with this construction has ever been promulgated by the courts of the State of Florida, the final arbitrators of the meaning of state law.

Nominally, it would appear that the two provisions of the Statute are in conflict. Penal Statutes in Florida are read liberally in favor of the Defendant and against the State. See: *State v. Winters*, 346 So.2d 991 (Fla. 1977); see also: *United States v. Gaskin*, 320 U.S. 527 (1944). The construction employed by the lower appellate court deciding this cause construed to the

contrary.

The ambiguity is heightened by the Statute when it speaks of exempting some felonies in which the *unlawful* carrying of a firearm does not constitute an offense. After specifically enumerating certain specific offenses the Statute recites ". . .or other similiar offenses". Nonetheless, the decisions sub judice resolved all ambiguities against the Defendant and in favor of the State.

It would appear that the decision of the lower appellate court essentially established an offense never previously recognized by the state courts of Florida. Moreover, review should be granted by this Court in this matter, as the trial court, in overruling the magistrate, and subsequently refusing to dismiss the count and submitting it to the jury resolved this issue differently from the panel decision of the appellate court. The trial court in granting the directed judgment of acquittal, did so as the homeowner merely possessed the firearm on his person and in no way attempted to employ it in the possession (with intent to deliver) of cocaine. The appellate court has held that the *naked possession* by the homeowner in his home, at the time he possessed or distributed the cocaine, violated the Statute regardless of his right to possess it concealed on his person while in his dwelling home. Merely because the Petitioner admitted carrying the pistol during the narcotics sale, his possession was not consequently unlawful within the meaning of 18 USC § 924, when state law provides otherwise.

The Petitioner further contends that he was severely prejudiced by the trial court submitting this issue to the jury. The Petitioner was put to trial upon a count that could not stand under the fact known to the government and the applicable state law as described above. This charge created no justiciable issue of fact and merely served to infer that the Defendant was a dangerous person who went about *unlawfully* armed. This too, tends to affect the credibility of the Defendant and his defense of entrapment relied upon in this case. (See Questions Presented 1, supra.) Had the court granted the motion for judgment of acquittal at the point where the government rested or even when the entire case was in, and then instructed the jury on the matter of law that the Defendant

was not unlawfully armed at the time of the alleged offenses, the harm may have been dispelled.

However, the court submitted the count to the consideration of the jury, and when the jury advised the court that they were unable to arrive at the verdict, the trial judge exhorted them to agree anyway and again failed to remove count three from their consideration though factually the court had to know it made no prima facie instance and demanded an acquittal. Additionally, the court instructed the jury that their inability to arrive at a verdict *would result in another jury hearing and deciding the same case on the same evidence.* Again, making known to the jury that the facts adduced made a case for the jury on each count. A directed judgment of acquittal even at that point would have placed the episode in its true perspective for resolve of the first two counts alone, uninfluenced by any assertion of the government that the Defendant was unlawfully armed.

A reasonable doubt was apparently harbored by at least some members of the jury and such was dissipated upon the giving of the charge and with no new evidence being offered. Where the verdict is so delicately poised between conviction and acquittal can it be said that allowing a count of being unlawfully armed to go to a jury where as a matter of law, a conviction could not be sustained, is harmless? Having permitted the count to remain before the jury where it should never have been is tantamount to putting items of character in issue to introduce a propensity to commit crime issue into the case in chief; the latter is not permitted. *Michelson v. United States,* 335 U.S. 469 (1948). A prosecutor has a professional duty not to charge a suspect with a crime unless he is *satisfied with the existence of probable cause. Gerstein v. Pugh,* 420 U.S. 103 (1975). The prosecutor in this instance would have the same professional obligations to seek indictment only under like circumstances. No facts existed to give rise to probable cause for the third count. See: *Schaffer v. United States,* 362 U.S. 511 (1960).

The submission of this question to the jury, that the Defendant at the time of the commission of the offense was

"armed with a weapon" sorely prejudiced the Petitioner's case. The firearm charge had no place in this trial except for the dogged insistence of the prosecution that it remain, it would never have been. Applying the error standards articulated by this Court in *Kotteakos v. United States,* 382 U.S. 750 (1946), wherein it said: "(10) If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and judgment should stand except perhaps where the departure is from a constitutional norm or a specific command of congress. *Bruno v. United States,* (1939) 308 U.S. at page 294, 60 S.Ct. at page 200. But if one could not say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

Applying the foregoing considerations it would appear prejudicial, reversible error occurred in the trial court and that the decision of the lower appellate court must likewise be reversed.

CONCLUSION

For the reasons set forth above, the petition for Writ of Certiorari should be . . .
GRANTED.

Respectfully submitted,

BY: _____

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I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari has been furnished by mail to Honorable Wade H. McCree, Jr., Solicitor General, Department of Justice, Washington, D.C., 20530, this 21 September 1978.

BY: _____
RAY SANDSTROM

APPENDIX

1. The decision of the Court of Appeals, Fifth Circuit
A.1-12

2. Petition for Rehearing
A-13

rectly provided the jury with a written copy of the jury charges. In *United States v. Schilleci*, 5 Cir., 1977, 545 F.2d 519, this court expressed disapproval of the practice of furnishing the jury with written copies of the jury charge, but stated, however, that the practice was "not error in itself." *Id.* at 526. As none of the circumstances that created the risk of prejudice in *Shilleci* is present in this case,[4] we reject defendant's contention.

AFFIRMED.

4. In *Shilleci* the court explained its dissatisfaction with the practice of furnishing the jury with written instructions.
It should be noted that the trial judge gave a written copy of his jury charge to each member of the jury to have to follow along as he read, and to carry into the jury room. Thus, the jury had the opportunity to give more consideration to separate portions of the charge, rather than to the total charge; and the jury was not instructed that the charge was to be considered by them as a connected series and viewed as a whole. *Id.* at 524.
The court went on to further explain its holding.
Other factors combined to compound this error [regarding defendant's ignorance of the law]. First, the charge was submitted to the jury in writing for them to consider during their deliberations. While not error in itself, the practice is conducive to dissection of the charge by the jury and overemphasis of isolated parts rather than consideration of the charge as a whole. Second, the jury was never instructed to consider the charge as an integrated whole. . .
While we are hesitant to rely on any one of the above errors as constituting in and of itself, reversible error, their combined effect, together with the unique factual situation presented, require reversal of these convictions.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Charles Frederick BOWER,
Defendant-Appellant.

No. 77-5336.

United States Court of Appeals,
Fifth Circuit

June 19, 1978.

Jury in the United States District Court for the Southern District of Florida, at Miami, C. Clyde Atkins, Chief Judge, found defendant guilty of possession with intent to distribute and distribution of cocaine and of unlawful possession of a firearm during the commission of his federal felony, but motion for judgment of acquittal as to the latter offense was granted, and defendant appealed. The Court of Appeals, Roney, Circuit Judge, held that: (1) defendant's carrying of a concealed weapon during narcotics sale in his own home was a violation of Florida statute, and thus "unlawful" within federal statute, so that there was no error in allowing firearms count to go to the jury; (2) since defendant was armed when arrested, trial court justifiably denied disclosure of informer's address when informer expressed concern for his personal safety, while granting defendant right to interview informer at any time before trial, and (3) issue of entrapment was for the jury.

Affirmed.

1. Weapons 4

Statute proscribing carrying a firearm unlawfully during the commission of a federal felony is violated only if the act of carrying the firearm is in and of itself a violation of federal, state or local law. 18 U.S.C.A. § 924(c)(2).

2. Weapons 4

Under Florida law, one need not obtain a permit to carry

a firearm in one's own home, but statute proscribing carrying a concealed firearm while committing or attempting to commit a felony contains no exception for felonies committed in the home and no exception for narcotics violations, and thus defendant's possession of a concealed weapon during a cocaine transaction in his own home was "unlawful" within the meaning of federal statute proscribing the carrying of a firearm unlawfully during the commission of a federal felony. 18 U.S.C.A. § 924(c)(2); West's F.S.A. §§ 790.-07(2)(3), 790.25 (3)(n).

3. Witnesses 2(2)

Where at no time either before or during trial did defendant seek an interview with informer or attempt to subpoena him for trial, he could not thereafter argue that his Sixth Amendment right to compulsory process was violated because of the Government's failure affirmatively to proffer informer for interview pursuant to pretrial order. U.S.C.A.Const. Amend.6.

4. Witnesses 216

On motion to compel disclosure of confidential informant, court must balance the benefits to defendant of disclosure against the resulting harm to the government; but when the defense is entrapment, this balancing test generally requires disclosure.

5. Constitutional Law 268(5)

Witnesses 216

Noting that defendant was armed when arrested, trial court justifiably denied disclosure of informer's address when informer expressed concern for his personal safety, while granting defendant right to interview informer at any time before trial, and failure to require disclosure of informer's address did not violate defendant's due process right to a fair trial. U.S.C.A. Const.Amend. 5.

6. Witnesses 269(10)

In prosecution for possession with intent to distribute and distribution of cocaine, in which government agent testified on direct examination as to the compensation paid to informer for the present case, there was no error in refusal to allow defendant to inquire on cross-examination as to amounts paid informer for work on previous cases, since this was not relevant to the facts testified to by the agent on direct examination.

7. Criminal Law 37(1)

The crucial issue in entrapment cases is whether defendant was predisposed to commit the crime, and the government's provision of aid, incentive, and opportunity for the commission of the crime amounts to entrapment only if it appears that defendant has done that which he would never have done were it not for the inducement of government operatives.

8. Criminal Law 739.1(2)

In prosecution for possession with intent to distribute and distribution of cocaine, issue of entrapment was for the jury, even though informer did not testify, so that defendant's account of informer's repeated attempts to persuade defendant to procure narcotics remained uncontradicted. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 401(a)(1), 21 U.S.C.A. § 841(a)(1).

Ray Sandstrom, Fort Lauderdale, Florida, for defendant-appellant.

Jack V. Eskenazi, U.S.Atty., James E. McDonald, Asst. U.S. Atty., Miami, Florida, for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before JONES, RONEY and TJOFLAT, Circuit Judges.

RONEY, Circuit Judge:

Defendant Bower was convicted of possession with intent to distribute and distribution of cocaine, and unlawful possession of a firearm during the commission of a federal felony. His convictions came about largely through the efforts of a paid Government informer. On this appeal defendant seeks reversal of his convictions, arguing: (1) there was no foundation for inclusion in the indictment of a count charging a federal firearms violation; (2) the Government's failure affirmatively to proffer the paid informer for a pretrial interview with defendant violated defendant's sixth amendment right to compulsory process; (3) the trial court's refusal to compel disclosure of the informer's address and its refusal to allow defendant to inquire into the amount of compensation paid the informer for previous cases violated defendant's due process right to a fair trial; and (4) entrapment was established as a matter of law. Finding no error, we affirm.

I. *Background*

The cocaine transaction leading to defendant's convictions was negotiated by Richard Clegg, a paid Government informer. In early April 1976 Clegg moved into the apartment above defendant. The two became acquainted, and Clegg soon began requesting defendant to supply Clegg with narcotics. After rejecting Clegg's overtures several times, defendant agreed to supply a quantity of cocaine to an Atlanta buyer. A deal was struck, and Clegg and Drug Enforcement Administration [DEA] agent Sylvestri, posing as the buyer, met with defendant at the latter's apartment to make the exchange. After delivering the cocaine to Sylvestri, defendant was placed under arrest. A .22 caliber automatic pistol was found inside defendant's waistband, concealed by his shirttail.

II. *Federal Firearms Violation*

The original two-count indictment charged defendant

with possession with intent to distribute and distribution of 116 grams of cocaine, both in violation of 21 U.S.C.A. § 841 (a)(1). A superseding indictment added Count Three, which charged defendant with possession of a firearm during the commission of a felony in violation of 18 U.S.C.A. § 924(c)(2). Defendant's motion to dismiss Count Three was referred to a United States Magistrate, who recommended the motion be granted. The district court, however, denied the motion, and trial commenced on all three counts. At the close of the Government's case and at the close of the entire case, defendant moved for judgment of acquittal. The district court denied the motion as to the first two counts and reserved judgment as to Count Three. After the jury had returned a verdict of guilty on all three counts, the district judge sentenced defendant to concurrent terms of two years imprisonment with three years special probation on the cocaine counts and granted defendant's renewed motion for judgment of acquittal as to Count Three, the federal firearms count.

[1] Defendant maintains that the district court committed reversible error in allowing Count Three to go to the jury. Count Three was based on 18 U.S.C.A. § 924(c)(2), which in pertinent part provides:

(c) Whoever. . .

(2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States, shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years.

Congress modified the verb "carries" with the adverb "unlawfully" in order to avoid imposing additional penalties on persons, such as policemen, who commit federal felonies while lawfully carrying firearms. *United States v. Ramirez*, 482 F.2d 807 (2d Cir.), *cert. denied sub nom., Gomez v. United States*, 414 U.S. 1070, 94 S.Ct. 581, 38 L.Ed.2d 475 (1973).

Section 924(c)(2) is violated only if the act of carrying the firearm is in and of itself a violation of federal, state, or local

law. *United States v. Rivero*, 532 F.2d 450 (5th Cir. 1976); *United States v. Soria*, 519 F.2d 1060 (5th Cir. 1975); *United States v. Garcia*, 555 F.2d 708 (9th Cir. 1977); *United States v. Howard*, 504 F.2d 1281 (8th Cir. 1974).

The Government has admitted from the outset that defendant did not affirmatively use the firearm during the cocaine transaction. Thus, defendant did not violate 18 U.S.C.A. § 924(c)(1), which makes it unlawful to *use* a firearm to commit a federal felony.

The entire episode occurred in defendant's residence. Under § 790.25(3)(n), Florida Statutes, it is not unlawful to carry a gun without a license in one's own home, even if concealed. See *Peoples v. State*, 287 So.2d 63 (Fla.1973); *French v. State*, 279 So.2d 317 (Fla. Dist.Ct.App.1973). Relying upon this statute, defendant argues, and the magistrate held, that even if the Government proved defendant lacked a license, his possession of the gun was lawful and therefore could not, as a matter of law, form the basis of a conviction under § 924(c)(2). Defendant urges that the effect of allowing Count Three to go to the jury was to allow the jury to consider otherwise inadmissible evidence of defendant's possession of the gun. This error, argues defendant, requires reversal. A review of Florida law, however, shows that under the undisputed facts of this case the Government was justified in charging defendant with violation of § 924(c)(2), and the district court did not err in submitting the count to the jury.

[2] Defendant's analysis of Florida's gun licensing statutes is correct: under § 790.25(3)(n) one need not obtain a permit to carry a firearm in one's own home. *Peoples v. State*, 287 So. 2d 63 (Fla.1973). The Government proves its case, however, if it can show that defendant's possession of the gun violated *any* firearms law. E.g., *United States v. Rivero*, 532 F.2d 450 (5th Cir.1976); *United States v. Howard*, 504 F.2d 1281 (8th Cir. 1974).

Another section of the Florida Statutes, § 790.07(2),

provides: "Whoever, while committing or attempting to commit any felony or while under indictment,. . .carries a concealed firearm is guilty of a felony." This statute contains no exception for felonies committed in the home. Although certain types of crimes are excluded from the application of this section, narcotics violations are not.

The following crimes are excluded from application of [§ 790.07]: Antitrust violations, unfair trade practices, restraints of trade, nonsupport of dependents, bigamy, or other similar offenses. Fla. Stat. § 790.07(3). "Other similar offenses" does not include narcotics violations. See *Stovall v. State*, 272 So.2d 866 (Fla. Dist.Ct.App .1973).

Florida courts have not adjudicated whether carriage of a concealed firearm during the commission of a felony within one's own dwelling house is exempted by any Florida law. It would appear that § 790.25(3)(n), which excepts the registration requirements for "a person possessing arms at his home", does not apply to firearm violations of § 790.07. See § 790.25(2)(a). We doubt the Florida courts would construe the Florida statutes to provide any exception to § 790.07 other than those within the section itself.

Defendant admitted carrying a concealed .22 caliber pistol during the narcotics sale, a clear violation of Florida Statutes § 790.07(2). His possession of the concealed weapon was therefore "unlawful" within the meaning of 18 U.S.C.A. § 924(c)(2).

Since the Government has not appealed the validity of the district court's judgment of acquittal on Count Three, we do not reach that issue. See *United States v. Boyd*, 566 F.2d 929 (5th Cir. 1978). We hold only that the district court did not err in denying defendant's earlier motions for judgment of acquittal and allowing the firearms count to go to the jury.

III. *Alleged Fifth and Sixth Amendment Violations*

Defendant alleges violations of his sixth amendment right to compulsory process and his fifth amendment right to a fair trial. In response to defendant's motion to compel disclosure of the name and address of the government's informant, the Government admitted Richard Clegg's identity, but moved for a protective order denying discovery of his current address. The court granted the Government's motion, but ordered the Government to make Clegg available for a pretrial interview with defendant. The court's order specifically provided that

> prior to trial the government shall make the confidential informant, Richard Clegg, available for interview by the defendant in a safe place outside the immediate presence of a representative of the government.

Because the Government did not affirmatively tender Clegg to defendant for interview prior to trial, the court held the pretrial order had been violated and refused to allow the Government to call Clegg as a witness.

[3] Defendant argues that his sixth amendment right to compulsory process was violated because the Government's failure affirmatively to proffer the informant for interview deprived him of his opportunity to develop the facts and circumstances surrounding the informant's involvement in the case. But at no time, either before or during trial, did defendant seek an interview with Clegg or attempt to subpoena him for trial. Defendant cannot now argue that his constitutional rights were violated. It is not alleged that the Government failed to disclose any *Brady* material in this case. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1962).

[4] Defendant also charges that the trial court violated his due process right to a fair trial by refusing to compel disclosure of informant Clegg's address and by limiting testimony concerning Clegg's compensation to the instant case. A trial

court faced with a motion to compel disclosure of a confidential informant can call on no fixed rule to guide its decision. Rather, in each case the court must balance the benefits to the defendant of disclosure against the resulting harm to the Government. *Roviaro v. United States*, 353 U.S.53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957); *United States v. Fischer*, 531 F.2d 783 (5th Cir.1976). When the defense is entrapment, this balancing test generally requires disclosure of the informer's identity since the defendant's freedom may rest upon allegations which the informer is in a unique position to affirm or deny. *United States v. Gomez-Rojas*, 507 F.2d 1213 (5th Cir.), *cert.denied*, 423 U.S. 826, 96 S.Ct. 41, 46 L.Ed.2d (1975).

[5] In the instant case, the court properly balanced the competing interests and arrived at a satisfactory solution. Noting that defendant was armed when arrested, the court justifiably denied disclosure of Clegg's address when Clegg expressed concern for his personal safety. See *United States v. Hansen*, 569 F.2d 406, 410 (5th Cir. 1978); *United States v. Toombs*, 497 F.2d 88, 94 (5th Cir. 1974).

To protect defendant's right to prepare his defense, the court granted defendant the right to interview Clegg at any time before trial. Defendant could have used this right to interrogate Clegg and, if pleased with the results, to serve him with a subpoena to appear as a defense witness. Indeed, had defendant desired to subpoena Clegg for appearance at trial, as he now urgently contends, he could have served Clegg through the office of the United States Attorney. Under these circumstances, the court's failure to require disclosure of Clegg's address is not reversible error. See *United States v. Gentile*, 495 F.2d 626, 633 n. 9 (5th Cir.1974).

[6] No error occurred in the court's refusal to allow defendant to inquire on cross-examination of agent Sylvestri into amounts paid Clegg for work on previous cases. The agent's testimony was limited to compensation for the present case. Clegg's compensation for earlier work was not relevant to

the facts testified to by Sylvestri on direct examination.

IV. *Entrapment*

Defendant contends the evidence established an entrapment as a matter of law. In support of this claim, defendant relies primarily on his own trial testimony that he had agreed to participate in the criminal enterprise in a moment of extreme depression. Defendant had recently turned 30 and, reflecting upon an uneventful past and contemplating a similar future, had decided to return to college and finish his education. Unfortunately, a year of voluntary unemployment had so depleted his personal finances that he could not return to school without working at least part time. Having hoped to be able to focus his undivided attention on his studies, defendant began to recognize Clegg's proposals as an opportunity to finance his schooling. His depression at this time was heightened by the fact that he and his girlfriend had recently severed their long-standing relationship. Consequently, although he had repeatedly rejected Clegg's earlier entreaties, he could no longer resist the temptation of the promised "exorbitant gains" to be reaped from a single cocaine sale.

Since Clegg did not testify at trial, defendant's account of Clegg's repeated attempts to persuade defendant to procure narcotics is uncontradicted. The record nevertheless contains evidence weighing against the contention that defendant was "an innocent seduced by government agent." *Pierce v. United States*, 414 F.2d 163, 165 (5th Cir.), *cert.denied*, 396 U.S. 960, 90 S.Ct. 435, 24 L.Ed.2d 425 (1969). Defendant admitted that he saw the sale as a source of "easy money" and that he expected to make a $1,000 profit on the transaction. He purchased the cocaine from a nongovernment source who trusted defendant enough to defer payment until defendant had resold the drug. Indeed, while negotiating the actual exchange, defendant assured DEA agent Sylvestri that he could handle Sylvestri's future cocaine needs if the amounts were not too large. Both

agent Sylvestri and defendant testified that during the transaction, defendant received a telephone call from his source. Defendant interrupted his telephone conversation to ask Sylvestri if he was interested in buying another four ounces of cocaine. When the DEA agent expressed interest, defendant requested his source "not to lock up the other four" and offered to produce the additional cocaine for Sylvestri in 30 minutes.

[7,8] On this evidence, the trial court did not err in submitting the entrapment issue to the jury. The crucial issue in entrapment cases is whether the defendant was predisposed to commit the crime. *Hampton v. United States,* 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1975); *United States v. Gomez-Rojas,* 507 F.2d 1213 (5th Cir.), *cert.denied,* 423 U.S. 826, 96 S.Ct. 41, 46 L.Ed.2d 42 (1975). The Government's provision of aid, incentive, and opportunity for commission of the crime amounts to an entrapment only if it appears that the defendant has done that which he would never have done were it not for the inducement of Government operatives. *United States v. Groessel,* 440 F.2d 602, 606 (5th Cir.), *cert.denied,* 403 U.S. 933, 91 S.Ct. 2263, 29 L.Ed.2d 713 (1971); see *United States v. Puma,* 548 F.2d 508 (5th Cir. 1977). Although the record contains evidence upon which a jury might conclude that defendant was induced by a Government informer to commit a crime that he was not otherwise predisposed to commit, the evidence was not "so overwhelming that it was 'patently clear' or 'obvious' that [defendant] was entrapped as a matter of law." *United States v. Groessel,* 440 F.2d 602, 606 (5th Cir.) (and cases therein), *cert.denied,* 403 U.S. 933, 91 S.Ct. 2263, 29 L.Ed.2d 713 (1971).

AFFIRMED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
FIFTH CIRCUIT

Case No. 77-5336
(USDC #76-6088-CR-CA)

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—vs—

CHARLES FREDERICK BOWER,
Defendant-Appellant.

PETITION FOR REHEARING

COMES NOW the Defendant and makes this Petition for Rehearing in the above cause and that other alternate relief mentioned below for this:

FIRST: That the panel deciding this appeal recognized that the highest court of the State of Florida has construed the Florida Statutes relating to the carrying of firearms on the person (chapter 790, Florida Statutes) in such a manner that it is *not* unlawful for one within his own home to carry a firearm concealed on his person [*Peoples v. State,* 287 So.2d 63 (Fla. 1973)]. However, this court has opined that pursuant to the statute [§ 790.07(2)] it would be unlawful if the homeowner within his home was committing the felony of delivery of cocaine and the firearm played no part in the commission of that felony but was simply on the person of the homeowner. In short, although the defendant-homeowner *lawfully* concealed a firearm on his person, the mere fact that subsequently within his home he delivered cocaine to another while the firearm was on his person, and in no way used by him, created an offense

of unlawfully carrying a firearm.

No decision with this construction was ever promulgated by the courts of the State, the final arbiters of the meaning of state law.

Nominally, it appears the two provisions of the statute are in conflict. Penal statutes in Florida are read liberally in the favor of the Defendant and against the State. See: *State v. Winters*, 346 So.2d 991 (Fla.1977); see also: *United States v. Gaskin*, 320 U.S.527 (1944). The construction employed by the panel deciding this cause construed it to the contrary.

The ambiguity is heightened by the statute when it speaks exempting some felonies in which the *unlawful* carrying of a firearm does not constitute an offense. After specifically enumerating certain specific offenses the statute recites ". . . or other similar offenses." Nevertheless, the decision sub judice resolves all ambiguities against the defendant and in favor of the State.

In the absence of a definitive decision by the highest state court resolving the language and application of the statute this Court ought grant rehearing and certify the following question to the Supreme Court of Florida, to wit:

> WHERE THE CARRYING OF A CONCEALED FIREARM BY A HOMEOWNER IN HIS OWN DWELLING HOUSE CONSTITUTES NO OFFENSE, IS THAT POSSESSION OF A FIREARM MADE UNLAWFUL MERELY BECAUSE THE HOMEOWNER MAY POSSESS COCAINE WITH THE INTENT TO DELIVER THE SAME PARTICULARLY WHERE THE FIREARM PLAYS NO PART IN THE OFFENSE LAST AFORESAID.

Or, in the alternative, since this decision establishes an offense never previously recognized by the State Courts of Florida, this case should be heard en banc by this Court. Particularly, since the trial court in overruling the magistrate, refusing to dismiss the Count and submitting it to the jury resolved this issue differently from the panel decision in this

instance. The trial court in granting the directed judgment of acquittal did so since the homeowner merely possessed the firearm on his person and in no way attempted to employ it in the posssession (with intent to deliver) of cocaine. This Court has held the *naked possession* by the homeowner in his home, at the time he possessed or distributed the cocaine, violates the statute regardless of his right to possess it concealed on his person while in his dwelling house.

SECOND: This Court recognized that a policeman lawfully possessing a firearm but who commits a felony is exempt from the operation of the statute. However, the right of the homeowner to possess the firearm, concealed on his person, while in his dwelling house is equal to his possessing a license to do so since the homeowner under those circumstances is exempt from the required license. Each being appropriately licensed to carry the firearm (one by grant and the other by exemption) is *lawfully carrying* the firearm. Each would be equally responsible for any felony committed while so carrying the firearm but neither would be guilty of "unlawfully" carrying the firearm.

THIRD: The decision of this Court which summarily holds the Defendant was not entitled to the address of the identified informant [Richard Clegg] appears wholly contrary to the holdings of the Supreme Court wherein it pointed out the value of the address of a witness. See: *Alford v. United States*, 282 U.S. 687 (1931); *Smith v. Illinois*, 390 U.S. 129 (1968).

FOURTH: The opinion asserts the Defendant was granted "the *right* to interview Clegg at any time before trial". Such is contrary to the facts. The government was to only produce the informant, Clegg, just prior to trial. Thereupon, the Defendant was limited to such interview, with no address for the informant or the ability to learn anything of him in his community or to garner impeaching materials.

FIFTH: Though the Defendant relied upon a defense of entrapment by a paid government informant and the ability of the informant to lure the Defendant into criminal activity was an issue, the trial court refused to permit the Defendant to inquire into the *total* amounts paid by the DEA to the infor-

mant for his services as such and limited the inquiry to solely the amount paid in *this* case. This court by its opinion approved that ruling and dispatched the same by asserting the same was not relevant evidence. Undoubtedly, this Court overlooked the fact that the length of service, the experience, the number of instances when the informant was "able" to cause the arrest of others (and the amount he was paid therefor) would shed light on whether the defendant was "lured" into the criminal act. The circumstances are clearly akin to the ability of a salesman, it is not measured by a *single* sale but rather on his *many* sales. The jury may have had the balance tipped in the favor of the Defendant's assertion of entrapment if they knew of the long series of occasions when others were led to commit an offense by the informant. Compare: *Davis v. Alaska*, 415 U.S. 308 (1974).

WHEREFORE, the Defendant aforesaid moves this Court to: (1) grant rehearing, (2) grant rehearing and certify an unresolved question of State [Florida] Law to the highest court of the State, and (3) grant rehearing en banc, or either of the foregoing.

I HEREBY CERTIFY that a copy of the foregoing Petition for Rehearing has been furnished by mail to The Office of the United States Attorney, Attn: James E. McDonald, Assistant U.S.Attorney, 300 Ainsley Building, 14 N.E. 1st Avenue, Miami, FL, 33132, this 29 June 1978.

Respectfully submitted,

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BY: /s/ Ray Sandstrom
RAY SANDSTROM